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NOTE

AIRCRAFT NOISE ABATEMENT: IS THERE ROOM FOR LOCAL REGULATION?

Noise pollution has become a serious problem for those who reside in the vicinity of major metropolitan airports. As one judge has observed,

[noise, including aircraft sound, is no less an environmental pollution than the smog and smoke that pollutes the air or the debris which poisons our lakes and rivers. It is the most difficult form of pollution to control. No one would expect that man should continually live inside his home with all doors and windows tightly shut or walk the streets or the fields with fingers in his ears or wear acoustical ear muffs, such as those employed on the flight line at an airport. It is regretfully concluded that the unwanted ambient noise, including noise emission from aircraft on the ground and in flight, will always be with us. The search is for the zone of unacceptable annoyance and a determination of what, if anything can be done in attenuation.]

Local efforts to curb aircraft noise have raised the perplexing question whether the control of this type of noise pollution should lie in the hands of local or federal authorities. Although local authorities are closest to the continuing complaints from local residents about airport noise, and thus in a position to respond to these complaints, they are confronted by a complex federal regulatory scheme in the field of air commerce. As a result, local action to abate aircraft noise may be precluded because of a conflict with federal regulations or because the federal regulatory scheme preempts the field. This Note examines the extent to which Con-


3 See notes 5-35 and accompanying text infra. For a discussion of federal and state relationships in an analogous field, air pollution control, see Green, State Control of Interstate Air Pollution, 33 LAW & CONTEMP. PROB. 315 (1968); Zimmerman, Political Boundaries and Air Pollution Control, 46 J. URBAN L. 173 (1969).

gress has preempted the field of aircraft noise abatement and considers the avenues, if any, which remain open to local authorities who seek to reduce excessive aircraft noise within their communities.

I

COMMUNITY RESPONSE TO AIRCRAFT NOISE

Localities surrounding major metropolitan airports have sought to remedy their discontent with aircraft noise in a variety of ways. Municipalities have enacted ordinances setting forth minimum altitudes for overhead flights, precluding overhead flights by means of prohibitive noise abatement standards, or restricting the hours of jet takeoffs and landings. In addition, municipalities, as well as private landowners, have brought suits against both airport operators and airlines.

Each attempt at a local solution to the problem, however, faces a potential conflict with federal regulation under the Federal Aviation Act and, more recently, under the Noise Control Act of 1972. For example, the village of Cedarhurst, New York, in response to the disturbances caused by aircraft noise from flights in and out of nearby Kennedy International Airport, enacted an ordinance prohibiting flights over its territory at altitudes of less than 1,000 feet. Although the village ordinance appeared to be in harmony with federal regulations which required all flights over populated areas to be over 1,000 feet, the federal district court,

5 See American Airlines, Inc. v. City of Audubon Park, 407 F.2d 1306 (6th Cir. 1969); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).
12 Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).
13 Under present Civil Aeronautics Board regulations, minimum safe altitudes of flight are defined as 1,000 feet above congested areas and 500 feet above other areas, except where lower altitudes are necessary for takeoff and landing. 14 C.F.R. § 91.79 (1974).
in *Allegheny Airlines v. Village of Cedarhurst*, held the ordinance invalid. The court, specifically finding that Congress had preempted the regulation of aircraft, regardless of altitude, pointed out that the 1,000 foot federal limit did not apply to takeoff and landing zones. Furthermore, the court was disturbed by the possibility that "if other villages and communities, adjoining the airport, should pass similar ordinances, the airport for all practical purposes would cease to function." A similar ordinance enacted more recently by a Kentucky city, prohibiting flights below 750 feet, was also declared void because of the conflict with Federal Aviation Administration (FAA) regulations.

After the Cedarhurst ordinance was struck down in 1956, a group of New Jersey cities and townships, all in the vicinity of Newark Airport, attempted to achieve altitude limitations by bringing a lawsuit to enjoin flights over their heavily-populated residential areas at altitudes of less than 1,200 feet. In *City of Newark v. Eastern Airlines, Inc.*, injunctive relief was denied because of conflict with federal regulations, leaving the New Jersey cities with no more of a solution to the noise problem than the village of Cedarhurst.

Since it became apparent that the courts would not tolerate local altitude restrictions which would conflict with FAA regulations, the town of Hempstead, New York, responded to the

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14 132 F. Supp. 871, 882 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956). An obstacle to the success of the village in this litigation was its failure to show substantial harm resulting from the low flights. The district court judge commented that "[n]o claim is now made by the defendants that those flights interfered with the enjoyment of the land beneath." 132 F. Supp. at 879.

Other opinions resulting from the Cedarhurst litigation include *All Am. Airways, Inc. v. Eldred*, 209 F.2d 247 (2d Cir. 1954); *All Am. Airways, Inc. v. Village of Cedarhurst*, 106 F. Supp. 521 (E.D.N.Y.), aff'd, 201 F.2d 273 (2d Cir. 1953).

15 132 F. Supp. at 882.

16 *American Airlines, Inc. v. City of Audubon Park*, 407 F.2d 1306 (6th Cir. 1969). The FAA regulations conflicting with the ordinance required aircraft to approach the airport adjoining the city on glide paths crossing the city at elevations of less than 750 feet. For further discussion of the FAA and its regulatory scheme, see note 4 supra and notes 46-61 infra.


18 *Id.* It was the view of the court that the doctrine of "primary jurisdiction" required the Newark plaintiffs to seek the desired change in altitude regulations from the FAA, that is, that settlement of the question should be left to the FAA because of its expertise and nationwide jurisdiction. For a discussion of the "primary jurisdiction" doctrine, see 3 K. Davis, Administrative Law 1-55 (1958). See also Shapiro, Abstention and Primary Jurisdiction: Two Chips off the Same Block—A Comparative Analysis, 60 Cornell L. Rev. 75 (1974).

19 See note 13 supra.
noise from aircraft overflights with an amendment to its antinoise ordinance which specifically prescribed limitations on aircraft noise itself. The affected airlines filed a challenge to the ordinance in federal court. In the resulting opinion, *American Airlines, Inc. v. Town of Hempstead*, the district court acknowledged the burden that the overflight noise had placed on the town's residents, but it nevertheless invalidated the noise ordinance, in an opinion affirmed by the Court of Appeals for the Second Circuit. Although in theory the ordinance only proscribed excessive noise and did not directly conflict with federal ceiling regulations, it had the effect of diverting flight paths around the town and thus outside of the flight patterns established by the FAA. "In a word," the district court concluded, "the Ordinance does not forbid noise except by forbidding flights and it is, therefore, the legal equivalent of the invalid Cedarhurst Ordinance."

Time restrictions on aircraft landings and departures have also been employed by municipalities to abate the noise generated by overhead flights during the hours when it is most disturbing, that is, between approximately eleven at night and seven in the morning. The city of Santa Monica, California, has imposed this type of curfew on jet departures from its airport. Although a California

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20 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969). The addition to Hempstead's Unnecessary Noise Ordinance forbade "anyone from operating a mechanism or device (including airplanes) which creates a noise within the Town exceeding either of two 'limiting noise spectra.'" 272 F. Supp. at 227. The facts showed unquestionably that while passing over parts of the town, planes taking off from, or on landing approaches to, Kennedy Airport regularly exceeded the first limiting noise spectrum. Id. at 228.

21 With the arrival of jets the noise problem had become acute for Hempstead residents, some 150,000 of whom live within three miles of Kennedy International Airport. The district court thus described their situation:

> It was as if every existing propeller craft runway had been suddenly moved out toward the boundary of the airport. The margin of laterally insulating air that had sheltered the neighborhood of the airport from take-off and landing noise was radically reduced and the impact on the surrounding communities was marked and unhappy.

Id. at 229.

The court of appeals noted the district court's findings that the town residents were thus subjected to noise intense enough to disturb sleep, interrupt conversations, disrupt religious services and classroom activities, drown out radio and television, and be a source of constant discomfort to the sick and annoyance to the healthy. 398 F.2d at 370.

22 398 F.2d 369 (2d Cir. 1968).

23 Id. at 371 n.1.


25 The curfew ordinance provides:

> No pure jet aircraft shall take off from the airport between the hours of 11:00 o'clock p.m. of one day and 7:00 a.m. the next day. The Airport Director or in his absence the watch commander of the Santa Monica Police Department may ap-
municipal court invalidated the Santa Monica curfew ordinance on the ground that the ordinance was an unconstitutional attempt to regulate a field preempted by both federal and state law,26 the state intermediate court of appeals reversed this decision, sustaining the ordinance as a valid exercise of the police power of the municipality,27 and finding no federal or California enactment which directly conflicted with the ordinance.28

In sharp contrast to the decision of the California court upholding the Santa Monica curfew ordinance is the 1973 decision of the United States Supreme Court in City of Burbank v. Lockheed Air Terminal, Inc.,29 in which a similar ordinance30 of the city of

prove a takeoff during said hours, provided it appears to his satisfaction that an emergency involving life or death exists and approval is obtained before takeoff.


26 Stagg v. Municipal Court, 2 Cal. App. 3d 318, 320, 82 Cal. Rptr. 578, 579 (1969). R. E. Stagg, a jet pilot, was charged with violating the ordinance. He filed a petition for a writ of prohibition in the superior court seeking to restrain the municipal court from proceeding with the trial, contending that the ordinance was an unconstitutional attempt to regulate a field preempted by both federal and state law. The superior court granted the writ of prohibition, concluding that the subject matter of the ordinance was preempted by state law. It did not reach the question of federal preemption. Id.

27 Id. at 323, 82 Cal. Rptr. at 581. The court found that "[t]he subject matter of the Santa Monica ordinance clearly comes under the cities' power to 'regulate the use of the airport.'" This power exists pursuant to a California law, which provides in pertinent part that, in connection with the construction and maintenance of airports and similar facilities, a local agency may:

(f) Regulate the use of the airport and facilities and other property or means of transportation within or over the airport.

(g) Perform any duties necessary or convenient for the regulation of air traffic . . . .

(i) Exercise powers necessary or convenient in the promotion of aeronautics and commerce and navigation by air.

CAL. GOV'T CODE § 50474 (West 1966).

28 2 Cal. App. 3d at 321, 82 Cal. Rptr. at 580. The state court noted that both the federal government and the state of California have regulations dealing with the flight of aircraft. See, e.g., 49 U.S.C. §§ 1301(24), 1348(a) & (c) (1970); CAL. PUB. UTIL. CODE § 21403 (West 1965). The court construed the policy expressed in these statutes to be that the right of flight generally should not be abridged. Despite this determination, however, the court concluded that "reasonable regulations by a municipality as to time, manner and place of takeoff from its airport are [not] precluded because they may incidentally affect, although they do not impair, the right of flight." 2 Cal. App. 3d at 321, 82 Cal. Rptr. at 580.

A New Jersey court, in response to a suit by a group of municipalities and individuals, imposed a similar time restriction on takeoffs and landings at the Morristown Airport. The court determined that although it could not supersede the expertise of the FAA on matters concerning safety, it could concern itself with the limitation of hours of operation, an area in which safety factors do not significantly come into play. Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 472, 261 A.2d 692, 697 (1969).


30 According to the Burbank ordinance,
Burbank, California, was struck down. The plaintiffs who sought the judgment declaring the eleven p.m. to seven a.m. curfew ordinance invalid were the owner and operator of the Hollywood-Burbank airport, an intrastate air carrier, and a trade association representing scheduled airlines. The Supreme Court affirmed the judgments below invalidating the ordinance on the ground that Congress, by enacting the Federal Aviation Act and the Noise Control Act, had preempted state and local control over aircraft noise.

II

LOCAL V. FEDERAL REGULATION: THE CONSTITUTIONAL DIMENSIONS

A. Federal Preemption

The issue of whether the federal government has preempted the field of aviation regulation was framed by the district court in Burbank in terms of whether federal legislation and regulations were intended "to fully occupy the field of control of the navigable

(a) . . . It shall be unlawful for any person at the controls of pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.
(b) . . . It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.
(c) . . . This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off.


31 The intrastate carrier, Pacific Southwest Airlines, was actually the only airline affected by the ordinance. It operated a regularly scheduled flight departing every Sunday night at 11:30 p.m. from the Hollywood-Burbank airport. 411 U.S. at 626.
32 The Air Transport Association of America (ATA), an intervening plaintiff, is an unincorporated trade association, the members of which include virtually all United States scheduled interstate carriers. 318 F. Supp. at 916.
35 The Supreme Court decided the Burbank case solely on the grounds of federal preemption, declining to decide whether enforcement of the Burbank ordinance conflicted with specific federal regulations or imposed an unreasonable burden on interstate commerce. 411 U.S. at 626 & n.2.
36 For a discussion of the development of the concept of federal preemption, see Comment, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959); Note, Congressional Pre-emption by Silence of the Commerce Power, 42 Va. L. Rev. 43 (1956).
Neither the Federal Aviation Act nor the Noise Control Act has express provisions for preemption. Faced with the question of congressional intent to preempt a field, the Supreme Court in Burbank looked to the tests set forth in Rice v. Santa Fe Elevator Corp. In that case the Supreme Court had determined that a purpose to preempt may exist (1) where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," or (2) where the congressional enactment touches a "field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or (3) where "the state policy may produce a result inconsistent with the objective of the federal statute." Relying on the Rice tests, Justice Douglas, writing for the majority in Burbank, concluded that the regulation of aircraft noise was preempted because of the "pervasive nature of the scheme of federal regulation." The Court's focus was on the extensiveness


38 An example of an express provision on preemption is found in the establishment of the Federal Communications Commission, by which it can be seen that the complete and pervasive federal regulatory scheme occupies the entire field. 47 U.S.C. § 301 (1970). On the other hand, neither the Federal Aviation Act, nor the Noise Control Act expressly provides for state control as do some other statutes. See, e.g., Natural Gas Act, 15 U.S.C. § 717(b) (1970) (provision for state regulation of local incidents of natural gas distribution); Air Pollution Control Act, 42 U.S.C. §§ 1857a(a), 1857 d(b) (1970) (state and local government regulation encouraged); Atomic Energy Act of 1954, 42 U.S.C. § 2021 (1970) (federal and state power to regulate atomic energy precisely defined).


This was the approach apparently taken by the Court in Burbank. For a discussion of the Court's analysis of the federal act and its legislative history, see notes 63-70 and accompanying text infra.


41 331 U.S. at 230.

42 411 U.S. at 633.
of the federal regulation of the use of navigable air space by the FAA under the Federal Aviation Act and on the comprehensiveness of the federal control of aircraft noise abatement by the FAA joined by the Environmental Protection Agency (EPA) under the Noise Control Act of 1972.

1. The Federal Statutory Scheme of Regulation

The Federal Aviation Act, the cornerstone of the federal statutory scheme regulating the use of navigable airspace, declares that the United States is "to possess and exercise complete and exclusive national sovereignty in the airspace" of the nation. The Act further declares the existence of "a public right of freedom of transit through the navigable airspace of the United States." Section 1348 of the Act authorizes the FAA to regulate the use of navigable airspace, "in order to insure the safety of aircraft and the efficient utilization of such airspace." With this provision of the Act in mind, the Burbank Court pointed to the findings of the district court that the imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in the hours preceding the curfew with the concomitant effect of increasing congestion and noise during those hours. The Supreme Court thus agreed with the conclusions of the district court that such results are "totally inconsistent with the objectives of the federal statutory and regulatory scheme," and "would cause a serious loss of efficiency in the use of the navigable airspace."

The FAA, under section 1348(c) of the Federal Aviation Act, is also authorized to prescribe "regulations governing the flight of aircraft . . . for the protection of persons and property on the ground." Prior to the enactment of an explicit noise abatement section in 1968, the Administrator prescribed noise abatement regulations pursuant to the authority conferred by section 1348(c). In 1968, Congress adopted section 611 of the Federal

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43 49 U.S.C. §§ 1301-1542 (1970); see note 4 supra.
44 See notes 58-60 and accompanying text infra.
47 Id. § 1304.
48 Id. § 1348 (emphasis added).
49 411 U.S. at 627.
50 Id. at 627-28.
52 See notes 54-55 and accompanying text infra.
Aviation Act which authorized the Administrator to prescribe rules and regulations for the specific control and abatement of aircraft noise and sonic boom. In formulating noise abatement regulations, the Administrator is obligated, under the directives of the Act, to balance the need for environmental protection in the area of noise abatement with considerations of safety, efficient use of the airspace, available technology, economic practicality, and the extent to which such regulations will further the overall purposes of the Federal Aviation Act.

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54 The 1968 enactment of § 611 provided in pertinent part:
In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title.


55 The Administrator is directed to consider the following factors as being in the public interest:
(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;
(b) The promotion, encouragement, and development of civil aeronautics;
(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;
(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;
(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.


Under the 1968 amendment to the Act, Congress supplemented § 1303, setting forth the following additional steps to be taken by the Administrator in prescribing noise abatement regulations:

... the Administrator shall—

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter . . .
(2) consult with such Federal, State, and interstate agencies as he deems appropriate;
(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.

Pursuant to his statutory authority, the Federal Aviation Administrator has promulgated operations rules and regulations controlling the flight of aircraft and the use of navigable airspace. He has also issued regulations in the field of noise abatement.

The Noise Control Act of 1972, approved by the President on October 27, 1972, involves the EPA in the scheme of federal regulation of aircraft noise. Under section 7(a) of the Act, the Administrator of the EPA is directed, "after consultation with appropriate Federal, State and local agencies and interested persons," to conduct a nine-month study of the adequacy of FAA noise controls and standards, the noise exposure problem around airports, and the measures available to local governments and airport operators to control aircraft noise. Section 7(b) of the Act directs the EPA, upon completion of the study, to submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare.


According to the district court judge in American Airlines, Inc. v. Town of Hempstead, these regulations evidenced the extensiveness of federal control. In his view, "[t]he powers granted by the Congress are not dormant but actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail and manifest sophistication." 272 F. Supp. 226, 232 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969).

FAA regulations to insure efficient use of the airspace, pursuant to federal law (49 U.S.C. § 1348(a) (1970)), include "flow control" procedures, which involve monitoring aircraft in traffic situations. Such procedures enable the FAA to regulate the number of aircraft that will be accepted in an area and restrict altitudes or routes for specified time periods. The FAA has also promulgated high density traffic airport rules which, in conjunction with flow control procedures, were designed to provide relief from congestion at major airports. 14 C.F.R. §§ 93.121-.131 (1970).

57 See 14 C.F.R. § 91.87(g) (1974) (regulation of flight procedures in interest of noise abatement); id. §§ 36.1-.201 (1974) (regulation of noise in field of aircraft design and performance). The latter regulations, adopted in 1969, prescribe noise standards which must be met as a condition to type certification for all new subsonic turbojet-powered aircraft.

58 42 U.S.C. § 4906 (Supp. III, 1973). Section 7(a) orders the Administrator of the EPA to conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise.

Under section 611(b) of the Federal Aviation Act, as amended by the Noise Control Act, the FAA, after considering the recommendations of the EPA and consulting with the Secretary of Transportation, may prescribe and amend regulations for the control and abatement of aircraft noise and sonic boom. The authority of the Federal Aviation Administrator extends to "the application of such standards and regulations in the issuance, amendment, modification, suspension or revocation of any [airworthiness] certificate."

Although both the district court and the court of appeals invalidated the Burbank curfew ordinance on the ground of preemption before the Noise Control Act of 1972 was signed into law, the regulatory scheme of the Noise Control Act constituted part of the basis of the Supreme Court's decision in Burbank. Thus, Justice Douglas declared for the Court that the "Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control."

Justice Douglas found support for this position in the legislative history of the 1972 Act. Both the Senate and House Reports indicated that the bill was not "intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments" that had existed with respect to matters dealt with by section 611 of the Federal Aviation Act of 1958 before the enactment of the new law. That relationship, which Congress outlined in the legislative history of section 611, is one in which the federal government has preempted "the field of noise regulation insofar as it involves controlling the flight of aircraft." Section 611, the Senate Report indicated, "would merely expand the Federal Government's role in a field already preempted." Since this preemption was not changed, the report

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60 Id. § 1431(b)(1).
61 Id. See also id. § 1431(b)(2).
62 411 U.S. at 632-33.
63 Id. at 633.
66 Id. The Senate Commerce Committee based its conclusion that the field was already preempted on its interpretation of the views expressed by the federal courts which had considered the question. The report directed particular attention to the district court's opinion in American Airlines, Inc. v. Town of Hempstead, wherein the court declared that "[t]he legislation operates in an area committed to federal care, and noise limiting rules operating as do those of the ordinance must come from a federal source." 272 F. Supp. 226, 231 (E.D.N.Y. 1966); see notes 85-86 and accompanying text infra. But see American Airlines, Inc.
continued, "[s]tate and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft."\textsuperscript{67}

However, several qualifications complicate the picture of federal preemption under the present statutory scheme and under the Supreme Court's pronouncements in the \textit{Burbank} decision. The legislative histories of both section 611 and the 1972 Noise Control Act demonstrate that Congress did not intend to exclude action in the field of aircraft noise control by the state or locality where either functions as the proprietor of an airport. The Senate Report on the 1968 amendment, which became section 611, indicates that that legislation does not affect the rights of a state or local agency, as airport proprietor, to issue regulations as to permissible noise levels which can be reached by aircraft using the airport.\textsuperscript{68} In fact, airport proprietors can "deny the use of their airports to aircraft

\textsuperscript{v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969) (affirming invalidation of Hempstead ordinance solely because it conflicted with existing federal regulations, without reaching issue of preemption); notes 87-88 and accompanying text infra.}

For a discussion of cases in which courts found that the federal government had not preempted the field of aircraft noise control, see notes 93-96 and 100-05 and accompanying text infra.

\textsuperscript{67 Id. The entire field of air commerce, however, has not been preempted. In Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954), Braniff sought to invalidate a Nebraska ad valorem tax on flight equipment, arguing that federal legislation had preempted the entire field of air commerce. The Court rejected this argument, holding that any state action consistent with the federal scheme would be valid. Id. at 597.}

In \textit{Colorado Anti-Discrimination Comm. v. Continental Airlines, Inc.}, 372 U.S. 714 (1963), the Court found that the Federal Aviation Act, in particular those sections which prohibited air carriers from subjecting any person "to any unjust discrimination" (49 U.S.C. § 1374(b) (1970)) and required "[t]he promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations" (id. § 1302(c)), did not preempt state antidiscrimination legislation which barred racial discrimination in hiring by air carriers. The Court stated:

\textit{[W]e may assume . . . that these [federal] provisions prohibit racial discrimination against passengers and other customers and that they protect job applicants or employees from discrimination on account of race. The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations. Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938, and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains "dormant and unexercised," will not frustrate any part of the purpose of the federal legislation.}

\textsuperscript{372 U.S. at 723-24 (footnotes omitted).}

Finally, the Court ruled in \textit{Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.}, 405 U.S. 707, 721 (1972), that federal legislation does not evidence a congressional purpose to preempt state power to levy charges as a means to defray the costs of airport construction and maintenance. \textit{See Note, Pay Now, Fly Later: Head Taxes—A New Phenomenon in Airport Finance, 58 Cornell L. Rev. 759, 765-67 (1973).}

\textsuperscript{68 S. Rep. No. 1353, supra note 65.}
on the basis of noise considerations so long as such exclusion is non-discriminatory. This position is reaffirmed in the Senate Report accompanying the 1972 Noise Control Act. The Burbank Court acknowledged this rather broad exception to the doctrine of federal preemption and consciously declined to consider what limits, if any, would apply to a municipality as a proprietor. Furthermore, in promulgating noise abatement regulations, the FAA, recognizing the authority left to airport proprietors, makes no determination that the noise levels which it prescribes "are or should be acceptable or unacceptable for operation at, into, or out of, any airport."

Finally, the "saving clause" of the Federal Aviation Act suggests that the federal legislation was not intended to be exclusive. The Act provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Justice Brennan, concurring in Head v. New Mexico Board of Examiners, found that the inclusion of an identical provision in the Communications Act "plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable." The Burbank Court, however, did not consider the implications of the "saving clause." The language of the Court implies that the majority determined a finding of preemption to be unavoidable. Thus, the Court concluded that

[t]he Federal Aviation Act requires a delicate balance between safety and efficiency . . . and the protection of persons on the ground. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

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69 Id.
70 S. Rep. No. 1160, supra note 64.
71 411 U.S. at 635-36 n.14. The Court noted: [W]e are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. . . . Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power.
72 14 C.F.R. § 36.5 (1973); see notes 134-38 and accompanying text infra.
73 49 U.S.C. § 1506 (1970); see note 38 and accompanying text supra.
74 Id.
76 Id. at 444 (Brennan, J., concurring).
77 411 U.S. at 638-39 (emphasis added). Thus, the Court's determination of preemption
2. The Preemption Doctrine in Aviation Case Law

The rationale of the Burbank Court in reaching its conclusion on preemption is not a novel one when viewed in light of the decisions of lower courts faced with attempts to control aircraft noise by the exercise of local police power. The principle of federal preemption of flight path control was first adopted in Allegheny Airlines, Inc. v. Village of Cedarhurst,\(^7\) where the validity of a minimum altitude ordinance was in question. Examining the congressional delegation of power to prescribe flight safety rules, the federal district court found a clear intent to preempt the regulation and control of aircraft, regardless of altitude.\(^7\) The court held that the comprehensive scheme of the Civil Aeronautics Act of 1938, the predecessor of the Federal Aviation Act of 1958, “regulated air traffic . . . in the interest of safety to such an extent as to constitute preemption in that field.”\(^8\) The Court of Appeals for the Second Circuit affirmed the invalidation of the ordinance on that ground.\(^8\)

However, twelve years later, in American Airlines, Inc. v. Town of Hempstead,\(^8\) the Second Circuit passed over the preemption doctrine announced in Cedarhurst,\(^8\) and invalidated the Hempstead noise abatement ordinance on the narrower ground that the ordinance was in conflict with federal law.\(^8\) Although the district court in Hempstead had also found the town’s ordinance in conflict with federal legislation, it had gone further in holding that the ordinance prohibiting noise, which effectively forbade flight by setting a ground level decibel limit, operated in a preempted area.\(^8\) The

seems to be premised on the third category of the Rice tests, that is, that “the state policy may produce a result inconsistent with the objective of the federal statute.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Justice Douglas also found preemption because of the “pervasive nature of the scheme of regulation.” \(^41\) 411 U.S. at 633. This finding is within the first category of Rice tests, which declares that “the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. 331 U.S. at 230. See notes 41-42 and accompanying text supra.\(^7\)

\(^7\) 132 F. Supp. 871 (E.D.N.Y. 1955), aff’d, 238 F.2d 812 (2d Cir. 1956).
\(^7\) See notes 13-15 and accompanying text supra.
\(^8\) 132 F. Supp. at 881.
\(^8\) 238 F.2d 812 (2d Cir. 1956).
\(^8\) See notes 78-81 and accompanying text supra.
\(^8\) The court of appeals commented on the Cedarhurst case:
The opinion can be read either as a holding that the entire field of regulation of aircraft flight has been pre-empted by the federal government, or as a holding that the particular ordinance involved was in conflict with the federal regulatory scheme . . . Whichever reading is accepted it is clear that Cedarhurst is square precedent for holding the Hempstead ordinance invalid . . .

398 F.2d at 375.
district court found that "the Federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance."\footnote{Id. at 233.} The court of appeals declined to rule on this issue, choosing instead to find the ordinance in conflict with FAA regulations.\footnote{398 F.2d at 376. The court explained:} It concluded that it is "this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; another noise ordinance might not have that effect."\footnote{Id.} Likewise, the California Supreme Court, in \textit{Loma Portal Civic Club v. American Airlines, Inc.},\footnote{61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).} although refusing to enjoin flight operations on the particular facts of that case,\footnote{Id. at 591-92, 394 P.2d at 554, 39 Cal. Rptr. at 714.} declined to accept the theory of federal preemption of the field of control of flight operations.\footnote{Not persuaded of the soundness of a holding of federal preemption, the court concluded:} "It is far from clear," in the view of that court, "that every enforcement of any state-created right or duty which affects air transportation would conflict with the purposes of the federal regulation . . . [in] insuring safety of operations."\footnote{Id. at 591-92, 394 P.2d at 554, 39 Cal. Rptr. at 714.} Indeed, this

\footnote{Id. at 233.}
\footnote{398 F.2d at 376. The court explained:}
In view of the conflict between the ordinance and the federal regulation we need not consider the questions of federal pre-emption, and undue burden on interstate commerce. In some situations, federal legislation and regulation is deemed so pervasive as to rule out all state and local attempts to regulate in the areas thus "pre-empted" by the federal government. . . . The area of flight patterns and procedures may be one of these; this court's opinion in the Cedarhurst case implies that it is, where the California Supreme Court's opinion in Loma Portal Civic Club v. American Airlines, Inc. [61 Cal. 2d 582, 394 P.2d 542, 39 Cal. Rptr. 708 (1964)] says that it is not.

\footnote{Id. at 591-92, 394 P.2d at 554, 39 Cal. Rptr. at 714.}

\footnote{61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).}

\footnote{Id. at 591, 394 P.2d at 554, 39 Cal. Rptr. at 714.}

\footnote{Not persuaded of the soundness of a holding of federal preemption, the court concluded:}
A holding of federal preemption would have the effect of disabling the state from any action in the entire field . . . . [U]nless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibilities, there would result within that state a lacuna which the state would be powerless to fill.

\footnote{Id. at 591-92, 394 P.2d at 554, 39 Cal. Rptr. at 714.}
court, like the Second Circuit in the Hempstead case, characterized the Cedarhurst decision, notwithstanding the broad preemption language, as one which invalidated an ordinance which “plainly conflicts with the federal statutes and regulations.”

Although the pre-Burbank case law reflects a controversy over whether local attempts to deal with aircraft noise should be dealt with on the ground of preemption or of conflict with federal law, the results were generally the same regardless of the rationale adopted. If a court did not adhere to the preemption doctrine, an easily discernible conflict with FAA regulations would generally form the basis for invalidating local legislation or preventing state action which affected flight paths and procedures. In fact, one of the few types of local noise abatement measures which arguably could withstand attack on the ground of conflict is the type of time restriction ordinance which the Burbank Court struck down on the ground of preemption.

Prior to the Burbank decision a California court had sustained such a curfew ordinance and a New Jersey court had issued an injunctive order requiring a jet curfew. The California court in Stagg v. Municipal Court, adopting the rationale of the Loma Portal Civic Club decision, noted that “noise abatement is a federal as well as a state aim, and when not inconsistent with safety . . . would not necessarily present a conflict with federal law but might well reinforce it.” Hence, the court reasoned that reasonable regulations by a municipality as to time, manner, and place of takeoff from its airport, such as a curfew ordinance, should not be precluded because they may “incidentally affect, although they do not impair, the right of flight.” Similarly, the New Jersey court, in Township of Hanover v. Town of Morristown, agreed that limitation of the hours of an airport’s operation does not involve the safety factors which are the primary concern of the FAA, and hence is a

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93 Id. at 593, 394 P.2d at 555, 39 Cal. Rptr. at 715 (citing Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812, 814 (2d Cir. 1956)); see note 84 and accompanying text supra.
94 See notes 29-35 and accompanying text supra.
95 See notes 25-28 and accompanying text supra.
97 See notes 89-93 and accompanying text supra.
99 Id. The court distinguished regulations which govern the time, manner, and place of the takeoff from those that would abridge the right of flight. Id. Regulations which would abridge the right of flight would interfere with flight paths through the airspace above the minimum altitudes prescribed by the FAA or the airspace needed to insure safety in the taking off or landing of aircraft. Id.
variable with which the court may concern itself in devising a remedy for an airport noise problem.\footnote{101}

The Supreme Court did not reach the issue of conflict in its \textit{Burbank} decision, even though the issue was raised by the parties and litigated in the courts below. Both the district court and the court of appeals departed from the \textit{Stagg} and \textit{Hanover} characterizations of time restrictions as not conflicting with federal regulations.\footnote{102} The district court found that the \textit{Burbank} ordinance, by denying the use of navigable airspace for a period of hours, conflicted with the federal rights and obligations of air carriers.\footnote{103} The court of appeals found the Burbank ordinance in

\begin{footnotes}
\footnotetext[101]{Id. at 472, 261 A.2d at 697.}
\footnotetext[102]{Id. at 478, 261 A.2d at 700. The court thus found that since the federal legislation was designed to promote safety, its purpose would not conflict with local requirements designed to maintain community tranquility and welfare or protect local property interests. \textit{Id. at} 478-79, 261 A.2d at 701.}
\footnotetext[103]{318 F. Supp. at 927. The Civil Aeronautics Board, by issuing to scheduled airlines “Certificates of Public Convenience and Necessity” (49 U.S.C. \textsection\ 1371 (1970)), authorizes such airlines to fly specific routes and obligates them to give adequate service to the cities on their routes. \textit{Id.}}
\end{footnotes}
conflict with the FAA's order establishing a preferential runway at the Hollywood-Burbank airport for departures of jet aircraft between the hours of eleven p.m. and seven a.m. A second ground of conflict recognized by the court of appeals was that the local ordinance prohibited the exercise of the federally guaranteed right of transit through navigable airspace. The court held that "[t]he effect of the curfew was to terminate the right of flight of prospective passengers . . . ." for eight hours each day.

B. Interference with Interstate Commerce

State and local legislation designed to regulate aircraft noise is also subject to challenge as violative of the commerce clause. The commerce clause of the Constitution vests in Congress the authority to regulate interstate and foreign commerce. Even in the absence of congressional legislation, it is well-established that state and local governments may not materially affect commerce by their acts. The Supreme Court, in *Southern Pacific Co. v. Arizona*, restated the two long-settled tests for determining whether a local regulation violates the commerce clause. The *Southern Pacific* Court declared that since *Gibbons v. Ogden* was decided in 1824, it has been the responsibility of the courts to determine whether the local law (1) substantially impedes the free flow of interstate commerce or (2) operates in an area where the need for national uniformity requires that regulation be undertaken by a single authority.

The district court in the *Burbank* case made its determination of whether the curfew ordinance violated the commerce clause not by considering the effect of the Burbank ordinance singly, but by envisioning the adoption of flight curfews on a national level. Thus considered, the ordinance could not stand, for curfews imposed nationwide would result in a "serious loss of efficiency as

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104 457 F.2d at 676.
105 Id. at 676 n.12.
106 Id.
107 U.S. Const. art. I, § 8, cl. 3. This provision gives Congress the power "[t]o regulate Commerce with foreign nations, and among the several States."
109 325 U.S. 761 (1945). In *Southern Pacific*, the *Arizona Train Limit Law* (Ariz. Code Ann. § 89-119 (1999)), which made it unlawful to operate within the state a passenger train of more than fourteen cars or a freight train of more than seventy cars, was found to obstruct interstate train operation, and thus to be invalid under the commerce clause. 325 U.S. at 781.
111 325 U.S. at 767-69.
112 318 F. Supp. at 927.
to the use of airspace."\textsuperscript{113} Furthermore, the transportation of goods and passengers would be seriously interrupted, and the exercise and performance of an airline's rights and obligations would be impeded.\textsuperscript{114} This analysis brings the Burbank ordinance within the first \textit{Southern Pacific} test. In addition, the district court concluded "that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space."\textsuperscript{115} Hence, the second test of \textit{Southern Pacific} was met.

On its face, the city of Burbank's regulation of flight hours at Lockheed's airport would not seem to raise the issue of a potential burden on interstate commerce, because the curfew only affected the flight of an \textit{intrastate} carrier.\textsuperscript{116} However, the courts have held that Congress has the power to regulate aircraft operated solely within one state\textsuperscript{117} as well as interstate aircraft activities.\textsuperscript{118} This position stems from what the courts have termed the "affectation doctrine," that is, that Congress has the power to regulate any activity—\textit{interstate} or \textit{intrastate}—which directly affects interstate commerce.\textsuperscript{119} This theory was espoused by the Supreme Court in \textit{NLRB v. Jones & Laughlin Steel Corp.}.\textsuperscript{120}

Although activities may be \textit{intrastate} in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or

\textsuperscript{113} Id.
\textsuperscript{114} Id.; see note 106 and accompanying text \textit{supra}.
\textsuperscript{115} In American Airlines, Inc. v. City of Audubon Park, 407 F.2d 1306 (6th Cir. 1969), the court made a similar observation:

\begin{displayquote}
Pilots operating the aircraft of Plaintiffs cannot comply with the FAA regulations and also comply with the provisions of the ordinance of the City of Audubon Park . . . [Enforcement of the ordinance] would constitute an intolerable and undue burden upon interstate and foreign commerce . . . .
\end{displayquote}

\textit{Id.} at 1307.
\textsuperscript{116} 318 F. Supp. at 928.
\textsuperscript{117} See, e.g., \textit{Aircraft Inv. Corp. v. Fisher Flying Serv., Inc.}, 183 So. 2d 441 (La. Cir. Ct. App. 1966). There the court stated that Congress by virtue of the commerce clause of the United States Constitution has paramount power and control over air, and consequently has authority to enact regulations and statutes covering aircraft including aircraft operated wholly within a state.

\textsuperscript{120} 301 U.S. 1 (1937).
appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.\textsuperscript{121}

Similar reasoning led the district court in \textit{Burbank} to decide that the effect of the curfew ordinance on interstate commerce could not be assessed independently of a national perspective.\textsuperscript{122} The court's concern that if the Burbank ordinance were sustained it would encourage other communities to adopt similar measures parallels the concerns expressed by the federal district courts which invalidated the ordinances under review in the \textit{Cedarhurst}\textsuperscript{123} and \textit{Hempstead} cases.\textsuperscript{124}

Since both the court of appeals and the Supreme Court disposed of the \textit{Burbank} case under the supremacy clause\textsuperscript{125} on the ground of preemption, neither court addressed the question of whether municipal regulation of the type attempted by the city of Burbank would impose an undue burden on interstate commerce. However, the four members of the Supreme Court who dissented in \textit{Burbank} were of the view that the district court's determination of the commerce question, based upon a "predicted proliferation of possibilities" was of doubtful validity.\textsuperscript{126} The proper determination of an unreasonable burden on interstate commerce, according to the dissent, "turns on an evaluation of the facts of each case."\textsuperscript{127} Since the Burbank ordinance did not affect emergency flights and prohibited only one scheduled commercial flight each day and a few additional private flights by corporate executives, the dissenters thought that the ordinance could not be held to be an unreasonable burden on interstate commerce.\textsuperscript{128}

### III

**Federal Preemption: Implications for Municipal Proprietors of Airports**

#### A. Proprietary Versus Governmental Noise Abatement Measures

The most troublesome aspect of the Supreme Court's opinion in \textit{Burbank} is that although its language and rationale would

\begin{itemize}
\item \textsuperscript{121} \textit{Id.} at 37. \textit{See also} United States v. Cummings, 184 F. Supp. 18 (W.D. Pa. 1960).
\item \textsuperscript{122} 318 F. Supp. at 927.
\item \textsuperscript{123} \textit{See} note 15 and accompanying text \textit{supra}.
\item \textsuperscript{124} \textit{See} notes 23-24 and accompanying text \textit{supra}.
\item \textsuperscript{125} U.S. CONST. art. VI, \S 3, cl. 2.
\item \textsuperscript{126} 411 U.S. at 654. (Rehnquist, J., dissenting).
\item \textsuperscript{127} \textit{Id}.
\item \textsuperscript{128} \textit{Id}.
\end{itemize}
indicate that the federal government has preempted the entire field of aircraft noise abatement, the factual context of the case is limited to the situation wherein a municipality enacts noise abatement measures affecting a privately owned and operated airport. Such enactments were held to be void on the ground of federal preemption. The Court did not consider what limits, if any, apply to a municipality which functions as the proprietor of an airport. Its decision was concerned only with the municipality's exercise of its police power. In light of the crucial fact that the Hollywood-Burbank airport is probably the only airport in the country used by federally certified air carriers that is not owned and operated by a state or local government, the impact of the Court's opinion appears to be rather limited.

In fact, the legislative histories of the 1968 Noise Abatement Amendment and the 1972 Noise Control Act, as interpreted by the Court, indicates that these enactments would not affect the rights of municipal airport proprietors to issue and enforce noise abatement measures. The Port of New York Authority, for example, a local public agency created by a New York-New Jersey interstate compact which operates the airports in the New York metropolitan area, was held to have the right to prohibit jet aircraft from using a certain runway at La Guardia airport until the construction of a second runway was completed. This measure was taken by the Authority to avoid the concentration of jet aircraft noise which would have resulted from the use of this runway alone. The district court enforced the regulation by enjoining the airlines from violating it.

Similarly, the California appellate court in Stagg v. Municipal Court, upheld a jet curfew ordinance of the city of Santa Monica, the owner and operator of the Santa Monica airport. Although the
court did not ground its decision on Santa Monica's proprietary capacity, it did recognize the city's rights to regulate its municipally owned airport as a public utility and its authority to regulate the use of the airport under state enabling legislation. The result achieved by the Santa Monica ordinance parallels that attempted by the enactment of the Burbank ordinance which was struck down. The dissenting Justices in Burbank, critical of the court of appeals' and the majority's adherence to the distinction between municipalities acting in their proprietary capacity and those acting in a regulatory capacity, believed that the legislative history relied upon should not have been accorded controlling significance. "It simply strains credulity," Justice Rehnquist concluded, "to believe that the Secretary [of Transportation], the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews."  

138 2 Cal. App. 3d at 322-23, 82 Cal. Rptr. at 581. Under the California Government Code, the operation of a municipally-owned airport is expressly committed to the local agency. CAL. GOV'T CODE § 50470 (West 1966). A municipality may acquire property for use as an airport. Id. In addition, in connection with the erection or maintenance of airports or facilities, a local agency may:

(f) Regulate the use of the airport and facilities and other property or means of transportation within or over the airport.
(g) Perform any duties necessary or convenient for the regulation of air traffic.
(h) Enter into contracts or otherwise cooperate with the Federal Government or other public or private agencies.
(i) Exercise powers necessary or convenient in the promotion of aeronautics and commerce and navigation by all.

Id. § 50474; see notes 25-28 and accompanying text supra.


140 Id. at 652. It was the view of the dissenters that neither the legislative history of the Federal Aviation Act of 1958 nor that of the Noise Control Act of 1972 discloses any congressional intent to prevent local governments from enacting regulations such as that of the city of Burbank. They found that the legislative history of the 1972 Act evidenced primary focus on the alteration of procedures within the Federal Government for dealing with problems of aircraft noise already entrusted by Congress to federal competence. The 1972 Act set up procedures by which the Administrator of the Environmental Protection Agency would have a role to play in the formulation and review of standards promulgated by the Federal Aviation Administration dealing with noise emissions of jet aircraft. But because these agencies have exclusive authority to reduce noise by promulgating regulations and implementing standards directed at one or several of the causes of the level of noise, local governmental bodies are not thereby foreclosed from dealing with the noise problem by every other conceivable method.

Id.

The dissenting Justices believed that the legislative history also indicated an "affirmative congressional intent to allow local regulation." Id. at 653. And even if it did not go that far, they believed that the history certainly did not reflect "the clear and manifest purpose of Congress" to prohibit the exercise of "the historic police powers of the states" which would
The dissent's objections appear to be well taken. The majority's posture that the scheme of the Federal Aviation Act, which "requires a delicate balance between safety and efficiency... and the protection of persons on the ground," necessitates a uniform and exclusive system of federal regulation, would certainly be undermined if municipal airport proprietors could freely restrict the use of their facilities by imposing jet flight curfews or other limitations. Indeed, the majority recognized that if a significant number of municipalities adopted such curfew ordinances, "fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the F.A.A. in controlling air traffic flow."

Nevertheless, since the Court's focus lay on the municipality's exercise of police power, the Burbank opinion leaves open the question of whether the actions of a municipal airport proprietor could be reached under the doctrine of preemption. However, the opinion of the federal district court in Port of New York Authority v. Eastern Air Lines, Inc. seems to indicate that the FAA may exercise its power to preempt an area of regulation in opposition to a proprietor's regulations. Crucial to the court's decision to be required before a conclusion of implied preemption is reached. Id. Thus, they concluded that Congress could pre-empt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of the Federal Aviation Administration... is sufficient to authorize him to promulgate regulations effectively pre-empting local action. But neither Congress nor the Administrator has chosen to go that route. Until one of them does, the ordinance of the city of Burbank is a valid exercise of its police power.

Id. 411 U.S. at 638-39.

Id. at 639.

Id.

See notes 129-31 and accompanying text supra.


Id. at 752. The Port Authority, for the purpose of noise abatement, had established a preferential system of landings and takeoffs on certain runways at La Guardia Airport, thereby restricting use of those runways. It was the view of the Eastern Regional Director of the FAA that the regulations would, under certain weather conditions, "complicate and place an unnecessary burden on air traffic control and derogate from the efficient movement of air commerce." Id. However, a letter to the Port Authority from the Federal Aviation Administrator stated that "in making the runway available for the fullest use required by safety considerations we are not directing that the runway be used." Id. at 753. In fact, the Administrator stated no objection to the continuation of the agreement between the Authority and the airlines to restrict use of the runway. Id.

Based upon these statements, the court concluded that although the FAA believed that the runways in question could be safely used, it was not then prepared to direct their use in the interest of safety or to preempt the regulation of their use in contradiction to the Port Authority's rules and regulations. It may thus be inferred that the court thought it possible
sustain the Port Authority's regulation was the fact that the FAA neither objected to the regulation nor intervened in the proceeding brought to enforce it against the airlines.\textsuperscript{147} It would seem that under the supremacy clause, an airport operator should be barred from imposing a restriction on flight operations which "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{148}

The Supreme Judicial Court of Massachusetts, although recognizing the authority left to airport proprietors in the area of noise regulation, seems to accept this position.\textsuperscript{149} In an advisory opinion holding that it would not be constitutionally competent for the state to enact legislation prohibiting the landing of any commercial supersonic aircraft within the state of Massachusetts, it remarked that "[e]ven if the bill were framed in terms of 'airport proprietors' there would still be serious doubt about its constitutional validity."\textsuperscript{150}

In contrast, it is clear that the status of a local government as proprietor would not insulate it from the exercise of federal control to the extent that Congress exercised such control pursuant to its powers under the commerce clause. In the absence of

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\textsuperscript{147} 259 F. Supp. at 753.
\textsuperscript{149} Opinion of the Justices, 359 Mass. 778, 271 N.E.2d 354, 358-59 (1971). The Massachusetts court acknowledged that the "legislative history of the 1968 amendment contains . . . some indication that Congress did not intend completely to exclude all State action in the field of aircraft noise control," and agreed that "the F.A.A. has acted consistently with the legislative history in leaving some authority to airport proprietors in the regulation of noise." \textit{Id.} at 357.
\textsuperscript{150} Id. at 358. In making this statement the court referred to an FAA notice of proposed noise control with respect to supersonic aircraft and indicated its belief that "[f]ederal action in this area may well invalidate any State action in the area." \textit{Id.} Furthermore, the court indicated that if state regulation of noise had an effect on the operation of aircraft in the state, "there would remain the question whether the bill imposes an unreasonable or discriminatory burden on interstate commerce." \textit{Id.} at 358-59.
\end{flushright}
congressional action, the commerce clause seems to protect the free flow of interstate commerce from the hostile actions of state or local governments even when they take such actions in their proprietary capacity. It has been held by the Supreme Court, in *Kansas City Southern Railway Co. v. Kaw Valley Drainage District*, \(^{151}\) that "freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing [interstate commerce], but extends to interference by any ultimate organ." \(^{152}\) In that case, it was not action by a state legislature, but action by a state court, which was found to interfere with interstate commerce. The Court found that a state court order to remove a bridge which was a necessary part of interstate commerce constituted an interference with such commerce and with a matter under the exclusive control of Congress. \(^{153}\) Since state court orders, as well as local legislation, are subject to scrutiny under the commerce clause, there does not appear to be any barrier to a similar analysis of state or local action taken in a proprietary capacity. Indeed, the *Port Authority* opinion suggests that the actions of a municipal airport proprietor could in fact be subject to considerations under the commerce clause as well as under the supremacy clause. \(^{154}\)

**B. Liability of the Municipal Airport Proprietor: Griggs v. Allegheny County Revisited**

The reservation of some authority for airport proprietors in the regulation of noise indicated in the legislative history of federal noise control legislation is required for consistency with the responsibilities placed upon the airport proprietor by the United States Supreme Court in *Griggs v. Allegheny County*. \(^{155}\) In that case the Court held that an airport operator is financially responsible to nearby property owners for property damage resulting from aircraft noise where commercial flights over the property are so low that the result of such activity is a "taking"—within the meaning of the fourteenth amendment—of an "air easement" over the property. \(^{156}\) The Court viewed this responsibility of the local au-

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151 233 U.S. 75 (1914).
152 Id. at 78.
153 Id. at 79. See also Western Union Tel. Co. v. Attorney Gen. of Mass., 125 U.S. 530 (1888) (holding that under statute authorizing telegraph companies to maintain lines on United States post roads, state could not stop operation of lines by injunction for failure to pay taxes).
154 259 F. Supp. at 752; see note 146 and accompanying text supra.
155 369 U.S. 84 (1962).
156 Id. at 89; see Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).
authority as part of its responsibility to acquire by eminent domain sufficient land for the operation of the airport.\textsuperscript{167} The Court observed that there was no difference between the responsibility of the local authority "for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built."\textsuperscript{158} According to this reasoning, the federal government "takes nothing," since it is the local authority which decides to build the airport and determines where it will be located.\textsuperscript{159} The effect of the \textit{Griggs} ruling is to direct complaining landowners to sue the local airport operator for a "taking" under the fourteenth amendment or comparable state constitutional provisions.

To maintain a position consistent with \textit{Griggs}, the FAA has acted to avoid responsibility for the taking of such noise easements. In issuing regulations pursuant to section 611 of the Federal Aviation Act,\textsuperscript{160} the FAA stated:

\begin{quote}
The noise limits specified . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.\textsuperscript{161}
\end{quote}

The regulations themselves indicate that no determination has been made that the specified noise levels need be "acceptable" in particular airport environments.\textsuperscript{162}

The Federal Aviation Administrator in a decision in \textit{In re Jordan A. Dreifus}\textsuperscript{163} has also evidenced the FAA's deference to the responsibilities of the local airport proprietor. In that case, the petitioner's residence was becoming exposed to increasing turbojet traffic and resulting noise. To remedy the situation, he requested generally that the FAA issue noise regulations to relieve the noise burden on the neighbors of the Santa Monica Airport and specifically that the FAA restrict the hours of operation of turbojet aircraft at the airport,\textsuperscript{164} as had been previously attempted by the
city of Santa Monica in an ordinance held invalid by a lower state court. In response, the Administrator declined to issue noise abatement rules beyond those already implemented, stating that "further relief from aircraft noise should involve airport use restrictions similar to those that . . . were issued in the Santa Monica City ordinance." Although the Administrator acknowledged that the Federal Aviation Act provided his agency with broad powers in the field of aircraft noise abatement, he took the position that section 611 of the Federal Aviation Act had not obliterated the authority of local government proprietors of airports. To support this position the Administrator quoted with approval the Senate report concerning the addition of section 611:

"The Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports."

The underlying policy for this position is the view that communities should bear a heavy share of the responsibility for assuring the compatibility of the air service they desire with their environmental objectives. If this policy is given effect, the rationale of Griggs, establishing local liability for the consequences of aircraft noise pollution, may be appropriately implemented, for then such liability would accompany responsibility for dealing with aircraft noise.

The dissenters in Griggs, however, took issue with the majority's determination that the airport operators should be responsible for taking the air easement. They took the view that the taking was done by the United States, for the airport was designed subject to federal approval and in compliance with federal requirements. Congress, they observed, had enacted a comprehensive scheme "regulating in minute detail virtually every aspect of air transit." Speaking for the dissenters, Justice Black em-

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165 See notes 25-28 and accompanying text supra.
166 Brief for Appellants, supra note 163, at Appendix 7.
167 Id. at Appendix 9.
168 Id.
169 Id. at 10.
170 369 U.S. at 91 (Black, J., dissenting).
phasized that the Federal Aviation Act guaranteed a “public right of freedom of transit in air commerce through the navigable airspace” and that the term “navigable airspace” included that “airspace needed to insure safety in take-off and landing of aircraft.” Thus, he concluded that

where Congress has already declared airspace free to all . . . it need not again be acquired by an airport . . . . Having taken the airspace over Griggs' private property for a public use, it is the United States which owes just compensation.

In fact, some commentators, believing the outcome of Griggs to be erroneous, have claimed that the dissenters' position that the federal government should be liable for the taking of noise easements would have enabled more meaningful relief to those residing in the vicinity of airports.

In any event, since the federal government, under the Supreme Court's decision in Burbank, has apparently preempted the field of aircraft noise control, the Court's decision in Griggs must be reconsidered. A necessary corollary to the Griggs decision is that airport proprietors, including state and local governmental agencies, must remain outside the scope of federal control. When narrowly viewed, the holding in Burbank does not require the overruling of Griggs, for the Court expressly declined to assert that municipal airport proprietors were preempted from taking measures to abate aircraft noise at the airports. But the Court did not say that there were no limits upon municipalities acting in their proprietary capacity. Indeed, it would be frivolous to assume, in light of the Burbank rationale, that jet curfews, for example, could be enacted by numerous municipalities in their capacity as airport proprietors. Even when acting as proprietors, municipalities are still organs of the state, and their actions may be subject to review now that the Court has espoused the doctrine of federal preemp-

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171 Id. at 92 (quoting Federal Aviation Act, currently codified at 49 U.S.C. §§ 1301(24), 1304 (1970)).
172 Id. at 93-94.
173 Thus, it has been said that [t]he inescapable fact is that the Griggs ruling placed the financial burden of aircraft noise on the segment of the aviation community that could do least about it. . . . Because Griggs failed to place the financial burden of aircraft noise on either the airlines or the Federal Government, neither had any direct economic inducement to assign to noise suppression the high priority it required in aircraft development—a rank co-equal to that of safety.
174 See notes 68-71 & 129-31 and accompanying text supra.
tion in the field of aircraft noise regulation. Certainly the pervasiveness of the scheme of regulation and the need for national uniformity emphasized by the Court in *Burbank* should be the determinative factors in reviewing the actions of a municipality, whether it exercises police powers or proprietary powers.175

If the rationale of *Burbank* were thus given its full meaning, the continued vitality of *Griggs* would be doubtful. The FAA would be able to exercise exclusive control over aircraft noise while the federal government and the airlines would remain shielded from liability.176 On the other hand, municipalities, whether acting in a proprietary capacity or exercising their police powers, would be powerless to take measures to abate aircraft noise, while remaining liable to nearby property owners for damages resulting from the noise of flights passing over their property.177

**CONCLUSION**

It is evident that a single regulatory scheme under federal auspices is the most desirable method of controlling aircraft noise. The national interest in the free flow of air commerce transcends the local interests of communities neighboring airports. The Supreme Court did, in fact, take this position in *City of Burbank v. Lockheed Terminal, Inc.*178 Nevertheless, the Court accepted the distinction between municipalities acting as airport proprietors and those acting in a regulatory capacity, declaring that federal legislation preempted only the actions of the latter. Although the *Burbank* decision clarified an area of the law to the extent that it announced federal preemption of the field of aircraft noise, and although its rationale might be extended to reach the actions of municipal proprietors, its limited holding appears to leave unchanged the situation described by one legal writer several years ago:

The F.A.A. has attempted to play both ends against the middle—with the private citizens winding up in the middle. It piously states that no complete answer can come from the federal

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175 Indeed, the sweeping language of the *Burbank* majority would appear to support this position. See notes 42-45, 63, 77 & 111-15 and accompanying text supra.

176 If the *Griggs* doctrine did in fact give way to one of federal liability under the fifth amendment, that liability might be more limited than that of public airport authorities, especially in states whose constitutions provide for compensation for damaging as well as taking. See Note, *Federal Regulation of Air Transportation and the Environmental Impact Problem*, 35 U. Chi. L. Rev. 317, 336, 337 n.99 (1968).


government and that local regulation is both necessary and desirable. At the same time, it accepts with open arms the court determinations that any action to relieve the noise nuisance of aircraft must come from the federal government.\footnote{176} Under these circumstances, it is clear that a more effective federal program of noise abatement is needed. The environmental needs of local communities have not yet been satisfied. Until technology produces quiet jetcraft, the FAA must be spurred to a more active role in the field it has apparently preempted. Perhaps an outright reversal of \textit{Griggs}, placing liability for aircraft noise pollution on the federal government, would prompt more effective action. A counterbalance for the FAA itself, which could probably be implemented without great difficulty, would provide for a local voice in determining noise abatement procedures at airports. In this manner a regulatory system could be established which would be uniform, but which at the same time would remain responsive to the environmental needs of particular localities.

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